

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VIJAY PATEL INDIVIDUALLY
AND AS ADMINISTRATOR AND
WONGFUL DEAT HEIR OF
NATWAREL PATEL

PLAINTIFFS

VS.

HILL ROM COMPANY INC. AND
JOHN DOES 1-5

DEFENDANTS

RECORD EXCERPTS

Prepared By:

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IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI
17TH JUDICIAL DISTRICT

VIJAY PATEL, Individually,
as next of kin, and on behalf of the
ESTATE of NATWARLAL PATEL,
and for the use and benefit of the
wrongful death beneficiaries of
NATWARLAL PATEL, Deceased

APPELLANT

VS

CAUSE NO. CV2013-044GCD
No. 2015-TS-00371

HILL-ROM COMPANY, INCORPORATED,
JOHN and JANE DOE, INDIVIDUALS,
1-5, and UNNAMED CORPORATIONS, LLCS,
and OTHER BUSINESS ASSOCIATIONS, A-F

APPELLEE

TRANSCRIPT OF PROCEEDINGS

PRESIDING:

Honorable Gerald W. Chatham, Sr.
Circuit Court Judge
17 TH Judicial District
DeSoto County, Mississippi

FOR APPELLANT:

Stewart Guernsey
Attorney at Law
P.O. Box 167
Water Valley, MS 38965

FOR THE APPELLEE:

John R. McCarroll, III
Wyatt, Tarrant & Combs, LLP
1715 Aaron Brenner Drive, Suite 800
Memphis, TN 38120

Christopher R. Cashen
Dinsmore & Shohl, LLP
250 W. Main Street, Suite 1400
Lexington, KY 40507

DATE OF DECISION:

June 9, 2014
January 30, 2015

PLACE OF HEARING:

DeSoto County Courthouse
Hernando, Mississippi

**IN THE CIRCUIT COURT OF DESOTO COUNTY MISSISSIPPI
17TH JUDICIAL DISTRICT**

**VIJAY PATEL, Individually,
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and for the use and benefit of the
wrongful death beneficiaries of
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1-5, and UNNAMED CORPORATIONS, LLCs,
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APPELLEE

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No. CV2013-044GCD

CFN 71746

VIJAY PATEL ET AL
VS.

Counsel for Plaintiff
Ralph Stewart Guernsey
Counsel for Defendant

HILL-ROM COMPANY INCORPORATED ET AL
COMPLAINT

John Ramsey McCarroll, III
JUDGE Gerald W Chatham, Sr

=====

DATE

ORDERS, JUDGMENTS, ETC.

2/08/13 Complaint filed
c: atty

2/08/13 Issued Summons to CT Corporation System as Registered Agent
for Hill-Rom, Inc. - returned to atty for service

2/08/13 Receipt of \$160.00 #1698

4/10/13 Process of Service returned on CT Corporation System, as
Registered Agent for Hill-Rom, Inc. - served by personal
service on Matt Thibodeaux on 4/4/13

5/06/13 Answer of Hill-Rom Company, Incorporated
c: atty

6/24/13 Defendant, Hill-Rom Company, Incorporated's Notice of
Service of Discovery of First Set of Interrogatories and
Request for Production of Documents
c: atty

8/01/13 Verified Application of Christopher R. Cashen for Pro Hac
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c: atty

9/18/13 Receipt from Supreme Court

9/18/13 Order Granting Pro Hac Vice Admission of Christopher R. CR 02013
Cashen 0025586
cc: Guernsey, McCarroll & Cashen

9/30/13 Certificate of Circuit Clerk

10/09/13 Defendants Certificate of Compliance
c: atty

10/09/13 Notice of Filing of Clerk's Pro Hac Vice Statement Pursuant
to MRAP 46(b) (5)
c: atty

11/14/13 Motion to Dismiss
c: atty

11/14/13 Memorandum in Support of Motion to Dismiss
c: atty

12/10/13 Faxed Copy of Plaintiff's Memorandum in Opposition to
Defendant's Motion to Dismiss

12/11/13 Plaintiff's Memorandum in Opposition to Defendant's Motion
to Dismiss
c: atty

12/18/13 Plaintiffs' First Set of Interrogatories and Requests for
Production of Documents to Defendant Hill-Rom
c: atty

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No. CV2013-044GCD

CFN 71746

VIJAY PATEL ET AL
VS.Counsel for Plaintiff
Ralph Stewart Guernsey
Counsel for DefendantHILL-ROM COMPANY INCORPORATED ET AL
COMPLAINTJohn Ramsey McCarroll, III
JUDGE Gerald W Chatham, Sr

DATE

ORDERS, JUDGMENTS, ETC.

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12/18/13 Plaintiff's Responses to Defendant, Hill-Rom Company,
Incorporated's First Set of Interrogatories and Request for
Production of Documents to Plaintiff

c: atty

12/23/13 Reply in Support Hill-Rom's Motion to Dismiss
C:Atty5/23/14 Court Reporter's Estimate of Costs for Appeal
(Motion to Dismiss) \$12.00
S. Climer

6/10/14 Order - Motion to Dismiss is granted

CR 02014
0034482

cc: McCarroll, Guernsey & Cashen

6/10/14 Certificate of Circuit Clerk

6/19/14 Motion Pursuant to MRCP 59 to Permit Amendment of Complaint
Under Rule MRCP 12 and 15(a)6/30/14 Hill-Rom's Response in Opposition to Plaintiff's MRCP 59(e)
Motion

c: atty

8/25/14 Notice of Hearing on 10/21/14 on Motion for Reconsideration
c: Suzanne and MBB

9/24/14 Agreed Order Continuing Rule 59 Motion Hearing

CR 02014
0038672

cc: McCarroll, Cashen & Guernsey

9/24/14 Certificate of Circuit Clerk

11/25/14 Court Reporter's Estimate of Costs for Appeal

1/30/15 Order Overruling Rule 59 Motion

CR 02015
0043279

cc: McCarroll, Cashen & Guernsey

1/30/15 Certificate of Circuit Clerk

3/02/15 Notice of Appeal

c: atty

3/02/15 Receipt of \$200.00 #65669 for Appeal filing fee

3/03/15 Check to Supreme Court for filing fee on appeal

3/03/15 Letter to Supreme Court sending appeal information

3/12/15 Certificate of Compliance with MRAP 11(b) (1)

3/16/15 Designation of the Record

c: atty

3/18/15 Information request from Supreme Court

3/18/15 Receipt of \$500.00 as payment towards appeal

** CONTINUED ON NEXT PAGE **

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No. CV2013-044GCD

CFN 71746

VIJAY PATEL ET AL
VS.

Counsel for Plaintiff
Ralph Stewart Guernsey
Counsel for Defendant

HILL-ROM COMPANY INCORPORATED ET AL
COMPLAINT

John Ramsey Mccarroll, III
JUDGE Gerald W Chatham, Sr

=====

DATE

ORDERS, JUDGMENTS, ETC.

*** CONTINUED FROM PREVIOUS PAGE ***

3/18/15 Clerk's Estimate of Costs for Appeal
3/25/15 Notice from Supreme Court that Court Reporter Transcript is
due 5/19/15
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IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

VIJAY PATEL, Individually, as next of kin, and on
behalf of ESTATE OF NATWARLAL PATEL, and for
the use and benefit of the wrongful death beneficiaries of
NATWARLAL PATEL, Deceased

PLAINTIFF

VS.

CAUSE NO. CV2013-044GCD

HILL-ROM COMPANY, INCORPORATED, JOHN
and JANE DOE, INDIVIDUALS, 1-5, and UNNAMED
CORPORATIONS, LLCs, and OTHER BUSINESS
ASSOCIATIONS, A-F

DEFENDANTS

ORDER

This cause came before the Court on Defendant Hill-Rom Company, Incorporated's
Motion to Dismiss and the Court, having reviewed and considered the motion, briefs and
responses thereto, finds as follows:

1. On December 15, 2007, Natwarlal Patel was admitted to Baptist Memorial Hospital – DeSoto with heart-related distress. Because of certain medications being administered to Patel during his admission, Patel was labeled as a “fall risk” and was assigned to a bed with raised and locked side-rails and a weighted alarm. The Defendant, Hill-Rom, allegedly manufactured and/or supplied the bed utilized during Patel's stay.
2. According to the *Complaint*, in the early morning hours of December 19, 2007, Patel was found on the floor of his hospital room with the side rails of his bed lowered. The bed alarm system had failed to activate. Patel passed away on January 5, 2008, allegedly due to complications from the fall.
3. The Plaintiff filed his *Complaint* in this action on February 8, 2013, asserting claims of products liability against Hill-Rom. In response, Hill-Rom argues that the claims

FILED
DESOTO COUNTY, MISSISSIPPI

JUN 10 2014 ✓

DALE K. THOMPSON, CIRCUIT CLERK

are barred by the applicable statute of limitations and has moved to dismiss the *Complaint* in its entirety.¹

4. It is undisputed that the claims in this case are governed by Mississippi Code Ann. § 15-1-49, which provides:

- (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
- (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

Simply stated, unless some exception to the limitation period applies, the Plaintiff's claims against Hill-Rom must have been filed within three years of accrual of the action. In this case, the action accrued on January 8, 2008, at the latest – the date of Patel's death. Accordingly, the limitation period expired on January 9, 2011 – over two years before the filing of the instant *Complaint*.

5. However, the Plaintiff argues that an exception to the limitation period does, in fact, apply in this case. In his response, the Plaintiff contends that the Defendant fraudulently concealed their alleged negligence, and therefore, the Plaintiff's claims did not accrue until March of 2012, when information regarding Hill-Rom's alleged malfeasance was published in the Federal Register. In other words, the Plaintiff argues that his claims did not accrue until he knew or should have known of the injury *and* the cause thereof. The Plaintiff cites Miss. Code Ann. § 15-1-67 in support of their argument, which provides:

¹ The motion was filed as one to dismiss in accordance with Miss. R. Civ. Pro. 12(b)(6). However, because facts and evidence outside of the *Complaint* (with specific regard to the Plaintiff's claims of fraudulent concealment) have been considered, the Court will treat the motion as one for summary judgment.

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

6. First and foremost, the “discovery rule” set forth in Mississippi Code Ann. §15-1-49(2) only provides for a special exception to the standard three-year statute of limitations in cases involving “latent injury or disease.” A latent injury is defined as one where the plaintiff is precluded from discovery of the harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question, or when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act. *Doe v. Roman Catholic Diocese of Jackson*, 947 So.2d 983 (Miss. App. 2006) (citing *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47, 50 (Miss. 2005)). Because the injury at issue in this case – i.e., death – cannot be classified as latent, the discovery rule cannot apply. *Id.* It logically follows, then, that the date the Plaintiff discovered Hill-Rom’s alleged negligence is immaterial to the Defendant’s statute of limitation argument.

7. Even assuming, however, that the “discovery rule” did apply to this case, the Mississippi Courts have made it clear that, with regard to cases governed by §15-1-49(2), the cause of action accrues upon discovery *of the injury*, not discovery of the injury *and its cause*. According to the Mississippi Supreme Court,

In analyzing what the plaintiff must discover in order to trigger the running of the statute of limitations, we ordinarily are guided by the wording of a statute’s discovery provision . . . [And n]o provision of §15-1-49 provides that a plaintiff must have knowledge of the *cause* of the injury before the cause of action accrues, initiating the running of the statute of limitations.

Angle v. Koppers, Inc., 42 So.3d 1, 5 (Miss. 2010).*Id.* at 7. Again, even if we were to assume that the Plaintiff's injuries in this case were latent, the date of the Plaintiff's discovery of Hill-Rom's alleged negligence is still immaterial to the Defendant's position.

8. Finally, despite the Court's finding that the date of the Plaintiff's discovery of Hill-Rom's alleged negligence is immaterial to the motion currently before it, the Plaintiff has failed to establish a *prima facie* case against Hill-Rom for fraudulent concealment.

In order to establish fraudulent concealment, the plaintiff must prove that (1) the defendants engaged in some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of a claim, and (2) though plaintiffs acted with due diligence in attempting to discover the claim, they were unable to do so.

Doe, 947 So.2d at 987 (citing *Robinson v. Cobb*, 763 So.2d 883, 887 (Miss.2003)).

9. Here, the Plaintiff has failed to satisfy either prong of the fraudulent concealment test. He did not present any evidence showing that any party committed any act or conduct of an affirmative nature designed to prevent, and which did prevent, discovery of a claim. Nor has he presented any evidence showing any effort on his part to discover any information from Baptist Memorial Hospital – DeSoto or Hill-Rom prior to the filing of his *Complaint*. Importantly, neither the Plaintiff, nor his counsel appeared at the hearing on the Defendant's motion, despite being duly notified of the same.


Because the Plaintiff was or reasonably should have been aware of Patel's fall and subsequent death, the applicable statute of limitations was not tolled and expired three years from the date of Patel's death, at the latest. And because the Plaintiff failed to file the instant action prior to the expiration of the statute of limitations, his claims are barred. Accordingly, the

Defendant's *Motion to Dismiss*, treated as one for summary judgment by this Court, is well-taken and, hereby, **GRANTED**.

IT IS ORDERED that any and all claims filed herein against Hill-Rom Company, Incorporated, are dismissed, with prejudice, with each party being responsible for their own costs.

IT IS FURTHER ORDERED that immediately upon receipt this Order, the Clerk of this Court shall mail each party, via counsel of record, a certified copy of the same, contemporaneously making a note of said action on the Court's docket.

SO ORDERED this the 9th day of June, 2014.


HONORABLE GERALD W. CHATHAM
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

VIJAY PATEL, Individually,
as next of kin, and on behalf of the
ESTATE of NATWARLAL PATEL,
and for the use and benefit of
NATWARLAL PATEL, Deceased

Plaintiffs

Vs.

CAUSE NUMBER: CV2013-44GCD

HILL-ROM COMPANY, INCORPORATED,
JOHN and JANE DOE, INDIVIDUALS,
1-5, and UNNAMED CORPORATIONS, LLCs,
and OTHER BUSINESS ASSOCIATIONS, A-F

Defendants

ORDER OVERRULING RULE 59 MOTION

THIS CAUSE having come on for hearing on Plaintiff's Rule 59 Motion to alter or amend judgment and the Court having heard arguments and reviewed applicable authority does hereby Deny said motion.

SO ORDERED AND ADJUDGED this the 30th day of January, 2015.



GERALD W. CHATHAM, SR.,
CIRCUIT COURT JUDGE

FILED
DESOTO COUNTY, MISSISSIPPI

JAN 30 2015 ✓

1 IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

2 VIJAY PATEL, INDIVIDUALLY,
3 AS NEXT OF KIN, AND ON
4 BEHALF OF THE ESTATE OF
5 NATWARLAL PATEL, AND FOR THE
6 USE AND BENEFIT OF THE
7 WRONGFUL DEATH BENEFICIARIES
8 OF NATWARLAL PATEL, DECEASED

Plaintiff

VS.

CAUSE NO. CV2013-044-GCD

9 HILL-ROM COMPANY, INCORPORATED,
10 JOHN AND JANE DOE, INDIVIDUALS,
11 1-5, AND UNNAMED CORPORATIONS,
12 LLC's, AND OTHER BUSINESS
13 ASSOCIATIONS, A-F

Defendants

14 MOTION TO DISMISS

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23 DATE: Friday, May 23, 2014

24 PLACE: DeSoto County Courthouse
25 Hernando, Mississippi
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APPEARANCES

PRESIDING: HONORABLE GERALD W. CHATHAM, SR.
Circuit Court Judge
Seventeenth Judicial District
State of Mississippi

FOR THE DEFENDANTS:
HONORABLE JOHN MCCARROLL III
Attorney at Law
1715 Aaron Brenner Drive, Suite 800
Memphis, Tennessee 38120

HONORABLE CHRISTOPHER R. CASHEN
Attorney at Law
250 West Main Street, Suite 1400
Lexington, Kentucky 40507

REPORTED BY: STACY S. CLIMER, CSR 1026
Official Court Reporter

1 (THE FOLLOWING PROCEEDINGS TOOK PLACE IN OPEN
2 COURT.)

3 THE COURT: The Court would call Cause
4 Number 2013-44, Patel versus Hill-Rom
5 Company.

6 We're here this morning on a motion to
7 dismiss. The attorney for the plaintiff is
8 not here. The Court finds that he was
9 properly noticed, and therefore, I'm going
10 to proceed with -- I'll hear oral argument
11 from you, gentlemen, on your motion to
12 dismiss.

13 I read the file, read your motion, read
14 your memorandum, so I'm pretty familiar with
15 the issue. I'll recognize you, sir.

16 MR. CASHEN: Thank you, Your Honor.
17 Again, Chris Cashen and Mac McCarroll for
18 Hill-Rom.

19 This is a pretty straightforward
20 12(b)(6) motion on a product liability case,
21 Your Honor. Mr. Patel's estate alleges that
22 his death was caused, at least in part, by
23 falling out of a bed supposedly manufactured
24 by Hill-Rom. The issue today is whether or
25 not his claims are barred by the statute of
26 limitations.

27 The fall -- And all these facts are not
28 controverted. The fall, Your Honor, was on
29 December 19 of 2007. Mr. Patel

1 January 5, 2008. We have a three-year
2 statute of limitations for these claims, and
3 the suit was filed on February 8, 2013, more
4 than two years after that statute has
5 passed.

6 In the pleadings, the response to the
7 motion the plaintiff has raised, all he
8 argues is there was some fraudulent
9 concealment by Hill-Rom of these alleged
10 defects, but there's absolutely no proof of
11 that anywhere, Your Honor.

12 The plaintiff has to show that Hill-Rom
13 engaged in some affirmative act intended to
14 prevent discovery and that there was due
15 diligence in the examination of the claim.
16 And as the Court has seen in our briefs,
17 there's none of that, Your Honor. We move
18 to dismiss.

19 THE COURT: All right. Mr. McCarroll,
20 do you have anything to add to that?

21 MR. MCCARROLL: No, sir, I don't, Your
22 Honor.

23 THE COURT: All right, sir. Gentlemen,
24 I will get you a ruling forthwith, and I
25 appreciate your attendance here this
26 morning. Thank you very much.

27 MR. CASHEN: Thank you, Your Honor.

28 MR. MCCARROLL: Thank you, Your Honor.
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IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

VIJAY PATEL, INDIVIDUALLY,
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BEHALF OF THE ESTATE OF
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USE AND BENEFIT OF THE
WRONGFUL DEATH BENEFICIARIES
OF NATWARLAL PATEL, DECEASED

Plaintiff

VS.

CAUSE NO. CV2013-044-GCD

HILL-ROM COMPANY, INCORPORATED,
JOHN AND JANE DOE, INDIVIDUALS,
1-5, AND UNNAMED CORPORATIONS,
LLC's, AND OTHER BUSINESS
ASSOCIATIONS, A-F

Defendants

RULE 59 MOTION

DATE: Tuesday, November 25, 2014

PLACE: DeSoto County Courthouse
Hernando, Mississippi

APPEARANCES

PRESIDING: HONORABLE GERALD W. CHATHAM, SR.
Circuit Court Judge
Seventeenth Judicial District
State of Mississippi

FOR THE PLAINTIFF:
HONORABLE STEWART GUERNSEY
Attorney at Law
Post Office Box 167
Water Valley, Mississippi 38965

FOR THE DEFENDANTS:
HONORABLE JOHN MCCARROLL III
Attorney at Law
1715 Aaron Brenner Drive, Suite 800
Memphis, Tennessee 38120

HONORABLE CHRISTOPHER R. CASHEN
Attorney at Law
250 West Main Street, Suite 1400
Lexington, Kentucky 40507

REPORTED BY: STACY S. CLIMER, CSR 1026
Official Court Reporter

1 (THE FOLLOWING PROCEEDINGS TOOK PLACE IN OPEN
2 COURT.)

3 THE COURT: The Court would call Cause
4 Number 2013-44, Patel versus Hill-Rom
5 Company, et al. All right. Mr. Guernsey,
6 it's your motion, sir.

7 MR. GUERNSEY: Your Honor, this motion
8 involves two hearings, the first of which I
9 was not present, and that was due to
10 confusion from speaking to the assistants in
11 the clerk's office.

12 And I did indeed speak to Your Honor the
13 day before the hearing was to be held. Your
14 instruction was to call Susan or Suzanne,
15 your administrator. I did so. And she told
16 me in the nicest possible way that I was a
17 lawyer, and I needed to figure out what to
18 do, not to rely on her word or her advice.

19 But, Your Honor, that hearing was not
20 properly held because it was not timely
21 noticed. If we look at the Mississippi
22 Rules of Civil Procedure, Rule 6(d), Your
23 Honor, regarding motions, the Court says a
24 written motion other than one which may be
25 heard ex parte and notice of the hearing
26 thereof shall be served not later than five
27 days before the time fixed for the hearing
28 unless a different period is fixed by these
29 rules or by an order of the Court.

1 There is nothing, Your Honor, in the
2 file which indicates a notice of hearing in
3 that case on the motion to dismiss. But if
4 we were to assume for the sake of argument
5 that it were properly noticed, Your Honor,
6 still we believe that there was error in the
7 Court's dismissal with prejudice.

8 And, Your Honor, I have some case law
9 that I'd like to give the Court I've already
10 given to counsel opposite. If I may
11 approach.

12 THE COURT: Yes, sir.
13 (DOCUMENT PASSED TO THE COURT.)

14 MR. GUERNSEY: The case law that I've
15 just given Your Honor is specific to summary
16 judgment. The Court in its order granted
17 dismissal, but granted it through summary
18 judgment.

19 Both *Palmer v. Biloxi Regional* and the
20 other case, which is *Huff Cook v. Dale*,
21 emphasize to the courts in the State of
22 Mississippi that Rule 56 requires not five,
23 but ten days' notice of summary judgment.

24 I have searched the file, and there is
25 no mention of summary judgment prior to the
26 Court's order. Therefore, Your Honor,
27 dismissal with prejudice, with great
28 respect, was not appropriate because there
29 was indeed in plaintiff's

1 motion to dismiss a prayer to permit
2 amendment.

3 Even if we assume that the first hearing
4 was properly noticed, that motion for
5 permission to amend was before the Court,
6 and under the law, the rule of the cases
7 that I've just given to the Court, there is
8 required dismissal without prejudice. The
9 rule calls for ten days or such time as the
10 Court shall allow in which to file that
11 amended complaint.

12 Therefore, Your Honor, we would argue
13 first that the Court's order of dismissal
14 was not noticed and therefore not
15 appropriate, and secondly, we would argue
16 that even if it were properly noticed, the
17 Court's dismissal should have been without
18 prejudice for plaintiff to re-file an
19 amended complaint.

20 THE COURT: All right, sir. Mr. Cashen?

21 MR. CASHEN: Thank you, Your Honor.
22 Good morning. This is a Rule 59 motion,
23 Your Honor. And the ruling I believe the
24 plaintiff seeks under Rule 59 -- that he
25 seeks in his motion is not permitted under
26 Rule 59.

27 Essentially there are three grounds to
28 grant a Rule 59 motion: Any changes in
29 controlling law,, one; two

1 new evidence which was not previously
2 available; and three, a clear error of law
3 or manifest injustice.

4 None of those grounds under Rule 59
5 exist for the granting of the plaintiff's
6 motion. Instead he essentially has the two
7 arguments: One, notice of the hearing, and
8 two, the conversion argument on summary
9 judgment motion. I'll address both, even
10 though they're not grounds under Rule 59.

11 With respect to the notice, I don't
12 think that there can be any dispute that
13 this was properly noticed, Your Honor. The
14 motion was filed about a year ago. The
15 agreed on date of the hearing, May 23, was
16 agreed to by e-mail correspondence on
17 February 22 of 2014, with Mr. Guernsey.
18 That's attached as an exhibit to our
19 response to the Rule 59 motion.

20 Before the hearing on May 23, Mr.
21 McCarroll tried to contact Mr. Guernsey to
22 remind him of the motion even though it was
23 set by agreement on February 22. We were
24 advised that Mr. Guernsey had either retired
25 or his phone number wasn't working.
26 Nonetheless, we did confirm on May 20, three
27 days before the hearing, with Suzanne Lowrie
28 that the hearing was, in fact, set as the
29 parties had agreed.

1 I contacted Mr. Guernsey two days before
2 the hearing on May 21, and we had a series
3 of five e-mails between May 21 and May 23
4 confirming, in which I was attempting to
5 confirm, the hearing that had been set back
6 in February.

7 I'm not sure why Mr. Guernsey did not
8 calendar this motion since it was set in
9 February, but I again told him I'm going to
10 that hearing. I've got a plane ticket. I'm
11 traveling from Kentucky to be heard. I even
12 suggested if that hearing date was for some
13 reason not convenient anymore, that he could
14 contact the court and see if he could attend
15 by telephone that morning, and I'm fine with
16 that. So Mr. Guernsey was aware of that
17 hearing.

18 As a matter of fact, Your Honor, I
19 recall on May 23 when that motion was heard
20 Your Honor even mentioned that he had seen
21 Mr. Guernsey a couple of days beforehand and
22 reminded him of the hearing, that he would
23 see him on Friday at the hearing.

24 At that hearing on May 23 this Court
25 specifically found that it was properly
26 noticed. And, of course, that's also
27 reflected in the order.

28 So based on this long history of e-mail
29 correspondence and the hearing

1 set three months before it occurred, Your
2 Honor, I think it's properly noticed.

3 With respect to the conversion argument,
4 the conversion argument comes out of
5 plaintiff's response to the motion to
6 dismiss, and plaintiff's response was filed
7 back in December of 2013. And in that
8 response the plaintiff indicated that he had
9 attached certain FDA documents, and those
10 are the other papers outside of the
11 pleadings, which would convert the motion
12 from a Rule 12 motion to dismiss to a Rule
13 56 motion for summary judgment.

14 In the defendant's copy of that response
15 to the motion to dismiss no such documents
16 were attached. We called the Court and
17 asked if the Court received a copy of those
18 additional documents referenced in the
19 motion to dismiss. The Court never received
20 them. The Court's copy is also attached to
21 our response to the Rule 59 motion, Your
22 Honor.

23 Motions -- The only other document
24 outside of the pleadings which was contained
25 in the original motion to dismiss was my
26 e-mail to Mr. Guernsey saying the documents
27 that you said are attached to the response
28 are not there. Can I have a copy? And they
29 were never received.

1 So although the Court did convert this
2 to a motion for summary judgment in its
3 order, there were no extraneous documents
4 outside the pleadings that were
5 contemplated, so I think the conversion
6 motion must fail.

7 With response to the plaintiff's request
8 to amend the complaint under Rule 15, Judge,
9 well, that request was originally made when
10 the response to the motion to dismiss was
11 filed back in November of last year.
12 Nothing has been done in nearly the year
13 since that time, no grounds for a motion to
14 amend, no motion to amend, no documents, no
15 support whatsoever.

16 It was my understanding that when
17 Hill-Rom's motion to dismiss on the statute
18 of limitations was granted, the plaintiff's
19 motion to amend or at least mention of the
20 motion to amend and its response was
21 likewise denied.

22 So in summary, Your Honor, looking at
23 plaintiff's Rule 59 motion, he has put forth
24 no grounds whatsoever for granting of this
25 motion. He has simply rehashed arguments
26 previously made and previously rejected.
27 Thank you.

28 THE COURT: Yes, sir, thank you.
29 Anything further, Mr. Guernsey?

1 MR. GUERNSEY: Very briefly, Your Honor.
2 First of all, Your Honor, Rule 16 requires
3 five days' written notice. Mr. Cashen has
4 admitted that the e-mails back and forth
5 which the Court might interpret as notice
6 were, in fact, within the three days before
7 the hearing was held. They were not five
8 days out, as Rule 16 requires.

9 Number two, Mr. Cashen admits that there
10 were no papers outside of the pleadings
11 considered by the Court. If that is the
12 case, then conversion to summary judgment is
13 inappropriate, Your Honor, and therefore,
14 the motion to amend should be permitted.

15 Your Honor, finally, as to the basis for
16 Rule 59 -- for the Rule 59 motion, with the
17 greatest respect again for the Court, Your
18 Honor, it is clear error to violate Rule 16
19 and the order the cases that have been
20 presented to the Court.

21 The cases presented to the Court are
22 clearly addressed to Rule 56 and how it is
23 to be treated and clearly say that without a
24 specific notice as to summary judgment,
25 summary judgment is not appropriate.

26 For those reasons, Your Honor, we
27 believe that number one, the Court's ruling
28 of dismissal is inappropriate, and number
29 two, even should the Court all

1 motion to dismiss, it would be appropriate
2 for that dismissal to be without prejudice
3 and with permission to amend.

4 THE COURT: Thank you, Mr. Guernsey.
5 Anything further from the defense?

6 MR. MCCARROLL: No, sir, Your Honor.

7 THE COURT: All right, gentlemen. I'll
8 get you a ruling on this shortly.

9 The Court has an unusually vivid memory
10 of this particular incident, Mr. Guernsey.
11 I remember running into you in court
12 somewhere down the road, maybe Batesville or
13 somewhere, and acknowledged to you that we
14 had a motion set with you on Friday here in
15 DeSoto County. And we exchanged
16 pleasantries, and I said I'll see you Friday
17 is the way we left it. And then you weren't
18 here Friday, so I don't want an explanation.
19 I'm just trying to explain to you my memory
20 of it. And, of course, when you didn't
21 present here, I granted counsel's motion.

22 Anyway, I will certainly seriously
23 consider the motion that you filed and
24 counsel's response, and I will get you a
25 ruling shortly. Thank you.

CERTIFICATE OF COURT REPORTER

STATE OF MISSISSIPPI

COUNTY OF DESOTO

I, STACY S. CLIMER, Official Court Reporter for the Seventeenth Circuit Court District of the State of Mississippi, do hereby certify that to the best of my skill and ability I have reported the proceedings had and done in the motion hearing held in the matter of PATEL V. HILL-ROM COMPANY, being Cause Number CV2013-044-GCD, in the Circuit Court of DeSoto County, State of Mississippi, and that Pages 1 through 11 contain a true, full, and correct transcript of the proceedings as taken by me by machine shorthand with electronic verification, with the assistance of computer-aided transcription. This is to further certify that I have this date filed the original and one copy of said transcript, along with one 3.5" electronic disk of said transcript in pdf language, for inclusion in the record on appeal, with the Clerk of the Circuit Court of DeSoto County, Mississippi, and have notified the attorneys of record, the Circuit Clerk, and the Supreme Court Clerk of my actions herein.

I do further certify that my certificate annexed hereto applies only to the original and certified transcript and electronic disk. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or direction.

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Witness my signature, on this the 19th day of

May, 2015.

Stacy S. Climer

STACY S. CLIMER, CSR 1026
Official Court Reporter

CERTIFICATE OF SERVICE

I, Stewart Guernsey, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such to the following:

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non – MEC participants:

Hon. Christopher Cashen
250 W. Main St., Suite 1400
Lexington, KY 40507

Hon. Gerald Chatham
Circuit Judge
P.O Box 527
Hernando, Ms 38632

This is the 25th day of August, 2015.

/s/ Stewart Guernsey

Stewart Guernsey